No. 06-822

In The Supreme Court of the United States

CAROLYN KOCHERT, M.D.,

Petitioner,

v.

GREATER LAFAYETTE HEALTH SERVICES, INC., JOHN WALLING, and ANESTHESIOLOGY ASSOCIATES, P.C.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI OF RESPONDENTS GREATER LAFAYETTE HEALTH SERVICES, INC. AND JOHN WALLING

LARRY R. FISHER
Counsel of Record
STUART & BRANIGIN LLP
300 Main Street, Suite 900
P.O. Box 1010
Lafayette, IN 47902-1010
Telephone: 765-423-1561
Facsimile: 765-742-8175

Counsel for the Respondents, Greater Lafayette Health Services, Inc. and John Walling

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Does the Petition present any compelling reason for certiorari review when both the Seventh Circuit Court of Appeals and the district court held that summary judgment should have been granted to the Respondents because the evidence proffered by Petitioner failed to create any genuine issue of material fact that she suffered an antitrust injury or had antitrust standing and the testimony of Petitioner's expert witnesses was neither probative nor material to the resolution of these issues?

2. Does the Petitioner confuse the differing standards for the admissibility of expert testimony under FED. R. EVID. 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) with the production requirements under FED. R. CIV. P. 56 and this Court's prior opinions governing the evidentiary standards for summary judgments?

3. Did the Petitioner waive the second "Question Presented" in her Petition by failing to present the issue that "courts have an obligation to give reasons . . . why admissible expert evidence . . . is not sufficient to avoid summary judgment" [Petition at i] to the Seventh Circuit Court of Appeals?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

There are no parties to the proceedings other than those listed in the caption.

Respondent, Greater Lafayette Health Services, Inc., is an Indiana domestic nonprofit corporation. The Sisters of St. Francis Health Services, Inc., an Indiana privately held nonprofit corporation, is the sole member of Greater Lafayette Health Services, Inc.

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SUMMARY OF THE REASONS FOR DENYING THE PETITION

The petitioner, Carolyn Kochert, M.D. ("Kochert") lost on summary judgment. Contrary to Kochert's arguments, this case does not present any unique issue regarding the relationship between admissibility of evidence under Rule 702 of the Federal Rules of Evidence and "sufficiency" under Rule 56 of the Federal Rules of Civil Procedure. Although Kochert attempts to show some "tension" between these two rules, the facts and evidence before the lower courts show that Kochert simply failed to establish a genuine issue of material fact on the elements of her case, an appropriate and frequent outcome when a case does not merit further attention by a district court.

The district court determined that there was no genuine issue of material fact on several essential elements of Kochert's case, and the Seventh Circuit affirmed the district court on the basis that Kochert did not have any antitrust injury and did not have antitrust standing. Because there was no genuine issue of material fact, summary judgment was properly granted and affirmed. The opinion of the Seventh Circuit is based, not on any "reweighing" of the evidence, but upon undisputed facts. There is no significant issue of law or other compelling reason, as contemplated by Supreme Court Rule 10, for the Petition for Writ of Certiorari to be granted. The decision of the Seventh Circuit does not conflict with any other circuit court decision, does not decide an important federal question, and does not depart from the accepted and usual course of judicial proceedings. The issues decided by the Seventh Circuit simply do not meet the standards that guide this Court's exercise of its certiorari jurisdiction.

Although the district court denied the Defendants' *Daubert*[1] motions and found that the testimony of Kochert's experts was admissible, that ruling did not assure Kochert that there would be genuine issues of material fact. The expert testimony offered by Kochert may have been admissible, but it did not establish any genuine issue of material fact. This Court's own opinions have previously clarified the standards surrounding federal summary judgment practice. The standard is not merely that certain evidence meets or fails *Daubert*. The evidence before the district court must create a genuine issue of material fact on every element of a plaintiff's case. The district court and Seventh Circuit applied the basic rules of law regarding summary judgment under Rule 56 and reached the correct result.

Kochert's argument that lower courts have an obligation to explain their reasons for granting summary judgment in the face of admitted expert testimony is waived because Kochert did not first present this issue or argument in support of it to the Seventh Circuit. Although Kochert did raise and argue the issue regarding the different standards between Rule 702 and Rule 56, she never presented any issue of the district court's obligation and alleged failure to explain its reasoning in more detail. In keeping with this Court's practice of not reviewing issues which have not first been considered by the court of appeals, certiorari review of this issue should be denied.

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[1] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

Even if the issue had not been waived, both the Seventh Circuit and the district court provided well-reasoned and detailed analyses of the facts and the law to support their decisions, and nothing more is mandated or required by Rule 56. The decision of the Seventh Circuit shows precisely the reasons for its opinion. Kochert lacked antitrust standing and did not sustain an antitrust injury. The testimony of Kochert's experts was neither relevant nor material to the resolution of these issues, nor did such testimony establish any genuine issue of material fact. The undisputed evidence, including the testimony of Kochert's expert witnesses, showed that two anesthesiology groups were in direct competition with each other in Tippecanoe County until June 1, 2001, and therefore there could not have been any harm to competition before then. Kochert began practicing pain management on a full time basis in August, 2000. Kochert could not have sustained any antitrust injury in June 2001 because she was no longer a competitor in the practice of anesthesiology. The undisputed facts established that Kochert did not have any antitrust injury as a matter of law.

Neither of the lower courts "weighed" any evidence in order to find that Kochert lacked antitrust standing. The undisputed evidence demonstrated that there were other persons including patients, insurance carriers, and physicians who were in the practice of anesthesiology who would have been more efficient enforcers of any antitrust claim than Kochert.

The lower courts also did not weigh the evidence regarding any of the remaining issues, including the geographic market and Kochert's damages experts. Because the Seventh Circuit affirmed the district court on the issues of antitrust standing and antitrust injury, the

expert opinions regarding geographic market and damages were not material to the Seventh Circuit's decision. In any event, the testimony of these experts was insufficient to create any genuine issue of material fact. The Petition for Writ of Certiorari therefore presents no novel or compelling issues, and the Petition should be denied.

STATEMENT OF THE CASE

Anesthesiology Associates, Inc. ("AA") and Home Hospital ("HH") entered into a contract effective on September 1, 1994 for AA to be the exclusive provider of surgical and obstetrical anesthesia services at HH. The exclusive agreement was in effect continuously through the time the district court granted summary judgment in favor of the Defendants. Pet. App. at 2-3.

After the exclusive agreement was executed, AA offered each anesthesiologist who had privileges at HH, including Kochert, a subcontract to provide surgical and obstetrical anesthesia services at HH. Pet. App. at 2. On December 3, 1997, the members of AA voted unanimously not to extend Kochert's subcontract after it expired on March 1, 1998 because of Kochert's lack of civility and history of closing areas for which she was responsible which could have jeopardized AA's exclusive contract with HH. Resp. App. 1-3.

Prior to 1998, HH and St. Elizabeth Medical Center ("SEMC") were the two hospitals in Tippecanoe County where patients could receive inpatient and obstetrical anesthesia services. The two competing hospitals were combined in 1998 to form Greater Lafayette Health

Services, Inc. ("GLHS"). Pet. App. at 2. Lafayette Anesthesiologists ("LA") was formed in 1995 and Kochert became a member of this practice group. Resp. App. at 6-7. On June 1, 1998, LA entered into an exclusive contract to provide surgical and obstetrical anesthesia services to patients at SEMC. Pet. App. at 2. Thus, on June 1, 1998, LA, including Kochert, was a competitor with AA for outpatient surgical, inpatient surgical, and obstetrical anesthesia services for patients receiving such services in Tippecanoe County, and Kochert was herself the beneficiary of an exclusive contract for anesthesiology services.

Kochert had a longstanding interest in doing pain management and discussed her intention of developing a pain management practice on a full time basis with LA. Kochert became board certified in pain management in 1999. Kochert opened her own pain management practice, Advanced Pain Management ("APM"), on August 23, 1999. Resp. App. at 8-9; Resp. App. at 22-23.

Between 1999 and 2000, pain management accounted for an increasing percentage of Kochert's practice. By August 2000, Kochert devoted herself on a full time basis to her pain management practice. Pet. App. at 3. Kochert effectively ceased performing anesthesia services in August, 2000. Kochert was removed from the LA schedule for anesthesia services to patients at SEMC beginning in August, 2000, at her own request, because she felt that her pain management practice was growing and she would be unable to continue working on the anesthesia schedule and still continue to increase her pain management practice. Resp. App. at 23-24.

Kochert applied for privileges at the Women's Hospital in Indianapolis on August 18, 2000. Kochert only sought

privileges for pain management and stated on her application, "I do not intend to do surgical anesthesia." Resp. App. at 25-26, 28-29. Kochert terminated her membership in LA in the summer of 2000. Resp. App. at 22. After Kochert left LA and went into pain management on a full time basis, she was not in competition with either LA or AA because she was no longer providing anesthesia services to patients. Resp. App. at 14.

GLHS advised LA in February, 2001, that GLHS had decided not to renew LA's exclusive contract. GLHS awarded the exclusive contract for anesthesia services at SEMC to AA in 2001. Pet. App. at 2.

The evidence in this case failed to demonstrate any actual harm to competition due to any exercise of market power to increase the nominal price of anesthesia services. Pet. App. at 27. In March, 1998, AA and LA each had a standard rate for their services of $43 per unit. Resp. App. at 11, 5. AA increased its rate to $48 per unit in 1999. Resp. App. at 5. LA increased its rate to $48 per unit in 1998 or 1999. Resp. App. at 11. AA increased its standard rate to $53 on March 6, 2000. Resp. App. at 5. LA increased its standard rate to $52 per unit in the fall of 2001, and to $55 per unit on March 1, 2003. Resp. App. at 10-11, 20-21.

Although there were some anecdotal reports of incidents where the anesthesia care was substandard, there was no evidence to show there was any reduction in the quality of care provided by AA after March 1, 1998. Pet. App. at 27. Kochert's expert witnesses agreed they had no information that there was any reduction in the quality of care since January 1, 1998. Resp. App. at 33, 36-37.

There are numerous misstatements of fact in the Petitioner's brief. Kochert asserts at page 6 of her brief that, "Throughout the entire time period of this case, through the filing of this Petition, petitioner remains in Lafayette as a competitor in anesthesiology." In fact, Kochert ceased being a competitor in anesthesiology when she decided to pursue her pain management practice on a full-time basis in August, 2000. Pet. App. at 3; Resp. App. at 26-27, 30-31.

Kochert asserts at page 7 that March 1, 1998 was "the first occasion that a competitor in anesthesiology was excluded from the market." In fact, Kochert was not excluded from competition in 1998 as Kochert and the other LA doctors were direct competitors with AA in Tippecanoe County when they were awarded the exclusive contract at SEMC in 1998. The LA doctors also had privileges to provide anesthesia services at the other hospitals in the counties surrounding Tippecanoe. Resp. App. at 12-13.

Kochert asserts at page 7 that Walling and Bochenek "testified to the non-existence of the exclusive arrangement requiring these subcontracts as of March 1, 1998." In fact, the evidence showed that the exclusive contract had been renewed and was in force in 1998. Pet. App. at 2-3.

Kochert asserts at page 7 that as "a result of the animus that occurred with Petitioner, and the operation of the exclusive contract, Petitioner was forced to look for other work in the field of medicine besides anesthesiology as early as March 1, 1998." This is incorrect. On June 1, 1998, LA was awarded the exclusive contract to provide anesthesia services at SEMC. LA still held the exclusive contract at SEMC and continued to provide anesthesia

services at SEMC in direct competition with AA until June 1, 2001. Kochert voluntarily abandoned her anesthesia practice when she opened her pain management practice on a full time basis in August, 2000. Resp. App. at 26-27, 30-31.

Kochert asserts at page 8 that she was "ready, willing and able to continue practicing anesthesiology full time at GLHS, as late as 2002-2003." This, of course, would have been impossible, as Kochert had already opened her own pain management practice and was practicing pain management on a full time basis. Resp. App. at 26-27, 30-31.

Kochert asserts at page 22 that Seaman "established a spectrum of anticompetitive behavior commencing in 1998 and culminating in 2001." Neither Kochert nor Seaman contended that there was any anticompetitive behavior which established any antitrust injury in 1998 when Kochert's subcontract with AA was not renewed. Indeed, Kochert conceded in her Memorandum in Opposition to Defendants' Rule 12 Motions to Dismiss that she did not have any antitrust injury in 1998. Pet. App. at 23.

> Because two separate hospitals had anesthesiology practices, there was not an anti-competitive effect to the market as the result of Dr. Kochert alone being barred from practicing only at Lafayette Home Hospital. Had she brought an antitrust injury at that time, she would have legitimately faced a challenge for not alleging 'an antitrust injury' for standing purposes; her injury would have been limited to only her, as in many of the cases cited by Defendants. Even after Lafayette Home Hospital and St. Elizabeth merged, Dr. Kochert was not precluded from half the market – she and other members of LA could still practice at St. Elizabeth's.

Resp. App. at 39-40. Seaman acknowledged that Kochert did not sustain any antitrust injury from the nonrenewal of her subcontract with AA in 1998. Resp. App. at 35. Seaman also conceded that the consolidation of the OB unit at SEMC with the OB unit at HH did not constitute an antitrust violation. Resp. App. at 34-35.

Kochert further asserts at page 22 that Respondents' "exclusive dealing arrangement excluded Petitioner as a direct competitor and entailed the use of Respondents' market power." This is incorrect. The nonrenewal of Kochert's subcontract by AA on March 1, 1998, did not exclude Kochert as a direct competitor. Kochert and the other LA doctors continued to compete with AA at SEMC when they were awarded the exclusive contract for anesthesia services at SEMC on June 1, 1998. Resp. App. at 13. The nonrenewal of LA's exclusive contract at SEMC in 2001 did not exclude LA from continuing to compete with AA in the geographic market which Seaman defined to include the counties surrounding Tippecanoe County because the LA doctors continued to provide anesthesia services to patients at these hospitals. Resp. App. at 12-13. By the time GLHS elected not to renew LA's exclusive contract at SEMC, however, Kochert was no longer a competitor in the field of anesthesiology because she was doing pain management on a full time basis at her own medical facility. Resp. App. at 26-27, 30-31.

Kochert asserts at page 24 that even if she left the market before 2001, she would still have standing "since Seaman's admitted testimony, combined with that offered by Minore, Gertler and Ivankovich, found adverse competitive effects as early as 1998." As previously discussed, Seaman conceded that the nonrenewal of Kochert's subcontract in 1998 and the consolidation of SEMC and HH

OB units did not, themselves, cause any major anticompetitive concern. Resp. App. at 34-35. Minore and Ivankovich's opinions were limited to expressing opinions regarding the quality of care. Minore admitted that he knew nothing regarding the quality of care at SEMC. Resp. App. at 32-33. Neither Minore nor Ivankovich expressed any opinion that there had been any change in the quality of care. Pet. App. at 110-116, 125-127.

Kochert asserts at page 25 that Gertler testified there was a price increase of 26%. Gertler did not offer any opinions regarding the specific facts of this case as he admitted that he had no knowledge of the facts of this case. Resp. App. at 16-17. The specific facts showed that the rates AA and LA charged for anesthesia services remained competitive with each other.

GLHS and John Walling further object to the misstatements of fact and additional argument contained in the Petitioner's Appendix beginning at page 132. Not only does the Petitioner improperly extend her allowable page limitations by continuing her argument in her appendix, the purported showings of fact are not supported in the record. The rules of this Court do not contemplate that additional contentions may be made in the appendix. *See* SUP. CT. R. 14.2.

REASONS FOR DENYING THE PETITION

A. The District Court and the Seventh Circuit Court of Appeals Properly Applied the Standards Under Rule 56 and This Court's Prior Opinions.

Kochert's entire argument is predicated upon her contention that once the district court overruled the Defendants' *Daubert* challenges to the admission of the testimony of Kochert's expert witnesses, the district court and the Seventh Circuit erred in weighing the sufficiency of their testimony in granting and then affirming the Defendants' motions for summary judgment. Kochert presents in section A of her Petition (pages 11-20) an academic discussion of the relationship between admissibility and sufficiency of evidence. The fallacy of this argument is that it simply has no relevance to the decisions reached by either the district court or the Seventh Circuit.

Kochert asserts in her brief that the district court "weighed the evidence and concluded that it was not 'ultimately persuasive.'" In fact, neither the district court nor the Seventh Circuit "weighed" the evidence. The words "ultimately persuasive" quoted from the district court appear in the court's Memorandum and Order dated November 15, 2004 denying Defendants' *Daubert* motions ("*Daubert* Order"). Pet. App. at 35. The court did not weigh the evidence and conclude that the testimony of Kochert's experts was not persuasive as Kochert's Petition suggests. To the contrary, what the district court actually stated in its *Daubert* Order was, "It should be noted at the outset that the fact that the proffered evidence has passed muster under a *Daubert* analysis does not ensure or decide whether such evidence is ultimately persuasive." Pet. App. at 35. Likewise, in the Memorandum and Order dated

December 29, 2004 granting the Defendants' motions for summary judgment ("Summary Judgment Order"), the district court did not weigh the evidence and conclude that the testimony of Kochert's expert was not "persuasive." The word "persuasive" appears only once in the Summary Judgment Order, in reference to the prior *Daubert* Order: "Though the Court expressed judgments on the reliability and methodology of expert witness testimony, ***it did not pass judgment on whether those opinions were persuasive or sufficient to create a genuine issue of material fact***." (Emphasis supplied). Pet. App. at 19. The district court merely recognized that the evidence may not be persuasive in the end (*i.e.* to a jury if the case proceeded to trial), or sufficient to create a genuine issue of material fact for purposes of summary judgment.

The fact that the district court found the testimony of Kochert's expert witnesses to be admissible did not equate to a finding that there would be genuine issues of material fact. The thrust of Kochert's argument to this Court surrounds the differing standards between admissibility of expert testimony under FED. R. EVID. 702 and *Daubert* and the required burden of production under FED. R. CIV. P. 56 motions for summary judgment. Kochert then proceeds to meld these two standards herself by making assertions such as "[w]hen expert testimony is deemed admissible . . . it is invariably enough to create a dispute about a material fact." Petition at 14. Such a sweeping overstatement betrays Kochert's own misunderstanding of the production requirements under Rule 56. There is, of course, no requirement that all evidence be "expert" to create a genuine issue of material fact. Nor is there any requirement that once expert evidence is deemed admissible, that

it will carry the day on summary judgment. Kochert's own citation to this Court establishes this point.

> We could no more reliably reach conclusions on sufficiency through invocation of Daubert's factors than reach admissibility decisions through evaluation of the nonmovant's total burden of production. ***This is not to suggest that if a party's motion to exclude expert testimony is denied, it will later be foreclosed from asserting a motion for summary judgment.*** Quite to the contrary, it preserves the clarity that accompanies proper sequencing of the motions and makes it more likely that the court will approach the evidence as a whole at the summary judgment stage with a greater appreciation for the role and significance of the expert's testimony.

Andrew I. Gavil, *After Daubert: Discerning the Increasingly Fine Line Between the Admissibility and Sufficiency of Expert Testimony in Antitrust Litigation*, 65 ANTITRUST L.J. 663, 702 (1997) (emphasis supplied). This distinction was precisely what the district court recognized in this case. The district court correctly discerned the different standards and proper sequencing of its rulings, and summary judgment was properly granted without any weighing of the evidence.

Nothing in the cases cited by Kochert alter this conclusion. In fact, Kochert now acknowledges that there are at least four cases where the outcome was precisely the same.[2] *See Barnes v. Kerr Corp.*, 418 F.3d 583 (6th Cir.

[2] In her initial argument to the Seventh Circuit, Kochert suggested that there were no cases where this event had occurred. Resp. App. at 45. The four cases now cited by Kochert were presented to the Seventh

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2005); *Morgan v. United Parcel Service of America, Inc.*, 380 F.3d 459 (8th Cir. 2004); *Bailey v. Allgas, Inc.*, 284 F.3d 1237 (11th Cir. 2002); and *Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 146 F.3d 1088 (9th Cir. 1998). Although Kochert attempts to distinguish these cases in a footnote, they all support the district court's ruling in this case. Even with admitted expert testimony, the district court must evaluate all of the evidence in the record to determine whether there is a genuine issue of material fact. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000). Like each of the plaintiffs in these four cases, Kochert simply failed to establish a genuine issue of material fact, even with the admission of expert testimony. "An expert witness may be qualified to testify even though the expert's conclusions are legally incorrect." *Rebel Oil*, 146 F.3d at 1097. Further, "[t]he test [for the admission of expert testimony] under *Daubert* is not the correctness of the expert's conclusions but the soundness of his methodology," *Id.* (quoting *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 43 F.3d 1311, 1318 (9th Cir. 1995)).

The issue for summary judgment is not whether some facts are in dispute. There is no "weighing" of the evidence if the court determines that the evidence as a whole is not sufficient to go to the jury. "There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). "If the evidence is merely colorable . . . or it is not significantly probative . . . summary judgment may be granted." *Id.* at 249-250.

Circuit by the defendants, and, as is the case here, Kochert was then forced to attempt to distinguish them.

Moreover, the district court must review, not only the evidence favorable to the nonmovant, but also the "evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses." *Reeves*, 530 U.S. at 151 (reviewing FED. R. CIV. P. 50(a) motion) (quoting CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2525, p. 300 (2d ed. 1995)). The *Daubert* decision itself recognizes that conventional devices, including judgment as a matter of law and summary judgment, remain appropriate safeguards "where the basis of scientific testimony meets the standards of Rule 702" but the evidence is nevertheless insufficient to allow the case to proceed to the jury. *Daubert*, 509 U.S. at 596.

The decisions of the district court and the Seventh Circuit were properly decided under these standards. In the face of undisputed evidence about Kochert's anesthesiology practice and lack of antitrust injury and standing, the Seventh Circuit did not weigh the evidence or confuse the standards between admissibility and the evidentiary requirements for summary judgment.

The decision of the Seventh Circuit is also not in "conflict" with other circuits, as Kochert suggests in her Petition.[3] Likewise, Kochert's attempts to show a "conflict

[3] In particular, Kochert cites *Maiorana v. U.S. Mineral Products, Co. (In re Joint Eastern & Southern Dist. Asbestos Litig.)*, 52 F.3d 1124 (2nd Cir. 1995) as being in "direct conflict" with the opinion of the Seventh Circuit here. This assertion is incorrect. *Maiorana* is factually and procedurally dissimilar from the case at hand. The case involved an alleged workplace exposure to asbestos allegedly causing colon cancer. The expert testimony at issue was causation testimony based upon epidemiological studies. The Second Circuit held that the district court

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in the circuits" by reference to course materials from a recent ALI-ABA conference in San Francisco (Petition at 4) which included submission of a portion of the Manual for Complex Litigation, is unavailing and untrue to the actual discussion referenced.[4] In the referenced section, the author discusses the "conflict in the circuits on the proper interpretation of *Daubert*'s second prong" related to the relevance or "fit" of expert scientific evidence to the specific case. In the present case, the district court did not confuse the relevance of the scientific evidence to the case at hand. Indeed, the court ruled that the testimony was admissible. The quoted "conflict" has nothing to do with the decisions of the district court or the Seventh Circuit.

Although Kochert's arguments regarding the intersection of Rule 702 (including apparently *Daubert*) and Rule 56 undoubtedly make for interesting scholarly discussion, the facts and rulings in this case do not present the issue.[5] Kochert was unable to submit evidence sufficient to carry

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improperly judged the credibility of the witnesses (" . . . the district court's analysis . . . was rife with independent assessments of witnesses' conclusions and comparative credibilities. . . ."). 52 F.3d at 1133. In the instant case, because neither court weighed the evidence or invaded the province of the jury, there is in fact no "direct conflict" with this case.

[4] See, Opinion and Expert Testimony in Federal and State Courts, ALI-ABA Course of Study Materials, MANUAL FOR COMPLEX LITIGATION, (4th ed.) § 23.25, pp. 202-203 (2006).

[5] Although Kochert attempts to obtain certiorari review on the coattails of this Court's decision to grant such review in the case of *Bell Atlantic v. Twombly*, 126 S.Ct. 2965, *cert. granted* (6-26-2006), there is simply no correlation between that case and the instant case. *Bell Atlantic* involves an issue of whether antitrust cases require heightened pleading standards beyond the traditional "notice pleading" requirements of FED. R. CIV. P. 8 for purposes of surviving a motion to dismiss. That is not an issue here, and except for the fact that both cases are antitrust cases, there is no similarity.

her burden of production under Rule 56 due to the undisputed facts before the courts. None of the experts testified that Kochert was practicing anesthesiology in 2001 because it is undisputed that she was not. None of Kochert's experts testified that she was eliminated from competition in anesthesiology in 1998 because she was not. Thus, this case presents no compelling basis for review of the issues Kochert identifies, and Kochert's Petition should be denied.

B. Kochert Waived the Second Question Presented in Her Petition by First Failing to Advance the Issue in the Seventh Circuit.

Kochert, for the first time in her Petition, introduces an issue regarding the alleged obligation of the district court and the court of appeals to "give reasons - which cannot include weighing the testimony - why admissible expert evidence that reaches all material facts necessary to establish a claim for relief under applicable law is not sufficient to avoid summary judgment." [Petition at i]. The issue was not a part of any of the briefs or arguments made by Kochert to the Seventh Circuit. Resp. App. at 41-47. Because Kochert did not present this issue to the Seventh Circuit for consideration, the issue is now waived. This Court has typically declined to consider issues which were "not pressed or passed upon below." *Duignan v. U.S.*, 274 U.S. 195, 200 (1927); *see also Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 (1970). "Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212-213 (1998), *see also City of Springfield v. Kibbe*, 480 U.S. 257, 258 (1987). The reason for such restraint is that "[t]he Court decides which

questions to consider through well-established procedures; allowing the able counsel who argue before [it] to alter these questions or to devise additional questions at the last minute would thwart this system." *Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-646 (1992).

In *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 815-816 (1985), the Respondent failed to allege a nonjurisdictional defect in her response to the Petition for Certiorari review and the Court concluded that the defect had also not been raised in the court of appeals. Holding that the issue was waived, Justice Rehnquist stated for the Court: "Our decision to grant certiorari represents a commitment of scarce judicial resources with a view to deciding the merits of one or more of the questions presented in the petition." *Id.* Given the scarce resources of the Court, certiorari review of an issue that has been waived is not appropriate, and Kochert's request for such review should be declined.

C. There Is No Obligation on Lower Courts to Offer Explanations of Reasons Why Certain Evidence Is Insufficient to Create a Genuine Issue of Material Fact.

Even if the issue had not been waived, it has no merit and thus does not meet the standards for review by this Court. Kochert's statement of this issue contains an erroneous and unsupported conclusion that her expert testimony "reaches all material facts" (Petition at p. 11), thus somehow obligating the lower courts to offer an additional explanation. As has been shown, the expert opinions do not reach all material facts. Additional findings were therefore unwarranted by the legal issues or the facts of this case. Both courts provided clear and detailed

explanations of the reasons supporting their decisions and why the undisputed facts did not create any genuine issue of material fact. Kochert has offered no convincing reason why federal courts should be required to address issues or facts that are not significant to the basis for their decisions. Indeed, as this Court has previously observed:

> In our view, the plain language of *Rule 56(c)* mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other material facts immaterial.

Celotex Corp. v. Catrett, 477 U.S. 317, 322-323 (1986). Thus, there is no obligation for a court to address a fact which becomes immaterial when a party with the burden of proof fails to establish that there is a genuine issue of material fact on an essential element of her case. This Court has further expressly stated that "[t]here is no requirement that the trial judge make findings of fact." *Anderson*, 477 U.S. at 250. This is consistent with FED. R. CIV. P. 52(a) which states: "Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56. . . ." Nor do the cases cited by Kochert support any additional requirements with respect to rulings on motions for summary judgment. *See Goebel v. Denver and Rio Grande Western R.R. Co.*, 215 F.3d 1083, 1088 (10th Cir. 2000) (addressing a *Daubert* ruling, not a ruling on summary judgment); *Wildbur v. Arco Chem. Co.*, 974 F.2d

631, 644 (5th Cir. 1992) (specifically rejecting plaintiff's argument that district court's failure to list or refer to each factual and legal argument means court did not consider these facts or arguments).

Moreover, both the district court and the Seventh Circuit provided extensive explanations of the reasons for their decisions. The district court's Summary Judgment Order addresses all counts of Kochert's complaint and provides a thorough explanation of the basis for the court's ruling. The Seventh Circuit likewise issued an extensive opinion explaining in detail the basis for affirming the district court. It is difficult to conceive what more should be required. Although this issue has been waived for failure to first present the issue to the Seventh Circuit, Kochert's arguments on this issue are without merit. In either event, certiorari review is not justified.

D. Kochert Failed to Establish any Genuine Issue of Material Fact on the Issues of Antitrust Injury and Antitrust Standing.

Both the district court and the Seventh Circuit ruled that the undisputed evidence established that Kochert did not sustain any antitrust injury. In considering the issue, the Seventh Circuit observed that the threshold question was whether Kochert had suffered an antitrust injury. In order to support her claim of an antitrust injury, Kochert was required to demonstrate that her "claimed injuries are 'of the type the antitrust laws were intended to prevent' and 'reflect the anticompetitive effect of either the violation or of anticompetitive acts made possible by the violation.'" *Tri-Gen Inc. v. Int'l Union of Operating Eng'rs, Local 150*, 433 F.3d 1024, 1031 (7th Cir. 2006) (quoting

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977)).

The Seventh Circuit recognized that Kochert's antitrust injury theory was based upon her contention that there was a continuum of anticompetitive events beginning in 1998. After distinguishing the cases relied upon by Kochert in support of her continuum theory, the Seventh Circuit held that there was no evidence, including the testimony of Kochert's expert, Seaman, to support her contention that any of the actions taken by GLHS prior to 2001 had any anticompetitive effects, or could support any claim for an antitrust injury. Pet. App. at 11-12; Pet. App. at 14.

Given the total absence of evidence to establish any antitrust injury prior to 2001, the Seventh Circuit then considered the record to determine whether Kochert had sustained any antitrust injury when GLHS awarded the exclusive contract at SEMC to AA effective June 1, 2001. In order to establish an antitrust injury, it was necessary for Kochert to show that the termination of the exclusive contract between SEMC and LA in 2001 was the cause in fact of Kochert's injuries. The Seventh Circuit recognized that this event did not cause her any injury because her anesthesiology practice was "nonexistent by this point." Pet. App. at 14-15. Thus, the Seventh Circuit did not weigh the testimony of Seaman or any of Kochert's other experts in holding that Kochert failed to establish any antitrust injury.

In addition to finding that Kochert failed to sustain any antitrust injury, the Seventh Circuit also upheld the findings and conclusions of the district court that Kochert lacked antitrust standing as a matter of law. Once again,

the decisions of the courts below that Kochert failed to establish antitrust standing were based upon the undisputed evidence. The Seventh Circuit observed that the existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest diminishes the justification for allowing a more remote party to sue for antitrust. Pet. App. at 15-16. There was no dispute that the LA doctors had a much more direct interest which would motivate them to protect the public interest than did Kochert. In 2001, the LA doctors, unlike Kochert, were still practicing anesthesiology. *Id.* Furthermore, consumers or insurers would also be more efficient claimants if AA and GLHS were truly manipulating the market in order to raise prices and drive down the quality of care. The fact that Kochert was no longer practicing anesthesiology demonstrated that the causal connection between her injury and the antitrust violation was "tenuous at best." Pet. App. at 16. Thus, as with the issue of antitrust injury, the Seventh Circuit based its decision regarding antitrust standing on the evidence which was undisputed.

E. Kochert Also Failed to Establish any Genuine Issue of Material Fact on Her Remaining Antitrust Claims.

Because of its holding that Kochert failed to establish either antitrust injury or antitrust standing, the Seventh Circuit noted that it was "ultimately unnecessary" to consider whether there was any credible evidence of the type of anticompetitive effects alleged by Kochert. Pet. App. at 17. It therefore was not necessary for the court of appeals to even consider, let alone weigh, the testimony of Gertler whether there had been any anticompetitive

increase in price, or the testimony of Minore and Ivankovich whether there had been any anticompetitive actions which had decreased the quality of care. Their testimony simply was not at all material to the decision of the Seventh Circuit. Despite recognizing that it was not necessary to consider these issues or this testimony, the Seventh Circuit nonetheless observed that "the record is bereft of any credible evidence of the type of anticompetitive effects alleged by Kochert." *Id.*

The undisputed evidence established that there was no increase in any of the prices charged for anesthesia services. Pet. App. at 17. It likewise was unnecessary for the district court or the Seventh Circuit to weigh the testimony of Gertler regarding whether the actions of GLHS had caused any anticompetitive increase in price. Gertler admitted that he had no knowledge of the facts of this case. Resp. App. at 16-18. He admitted he did not know if the hospitals even had an exclusive contract, or what kind of contract they had or what happened to prices. Resp. App. at 18-19. His opinions were based entirely upon a paper which he had authored. Resp. App. at 15-16.

Kochert contends that she established antitrust injuries as early as 1998 because there had been a decrease in the quality of care based upon the testimony of her experts, Minore and Ivankovich. Neither the testimony of Minore nor Ivankovich established any decrease in the quality of care as a result of any exercise in market power. The Seventh Circuit recognized this failure. Pet. App. at 17. Further, Seaman conceded that there was no testimony or evidence that the quality of care had decreased after March 1, 1998. Resp. App. at 36-37. Without comparative information, evidence which is critical of the

quality of care is insufficient to establish an antitrust violation as a matter of law. *Flegel v. Christian Hosp.*, 4 F.3d 682, 688-689 (8th Cir. 1993); *Minn. Ass'n of Nurse Anesthetists v. Unity Hosp.*, 5 F. Supp. 2d 694, 707 (D. Minn. 1998), *aff'd*, 28 F.3d 655 (8th Cir. 2000).

Kochert's only expert who offered any opinion regarding the scope of the geographic market was Seaman. The proper geographic market is "that geographic area 'to which consumers can practically turn for alternative sources of their product and in which the antitrust defendants face competition.'" *Fed. Trade Comm'n v. Freeman Hosp.*, 69 F.3d 260, 268 (8th Cir. 1995). A determination of the proper geographic market must be based on the "commercial realities of the industry," *Brown Shoe Co. v. U.S.*, 370 U.S. 294, 336 (1962), and therefore, must involve a dynamic analysis of where consumers could practically go, not where they actually go. *Freeman Hospital*, 69 F.3d at 268-272.

The district court explained that Seaman's opinions regarding geographic market failed to create a genuine issue of material fact for two reasons. First, Seaman's own data failed to establish a geographic market using the E-H test. Seaman based his analysis on the Elzinga-Hogerty test (the E-H test) which calculates a Lifo, a percentage of patients who come from within the geographic area who go to GLHS, as well as the Lofi, the percentage of patients from outside the geographic area who go to GLHS. Pet. App. at 28. The district court found that Seaman's definition of the geographic market was too narrow. In doing so, the district court did not weigh Seaman's testimony. To the contrary, the district court simply found that Seaman's own data failed to support his conclusions. When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or other facts contradict or render the

opinion unreasonable, it cannot support a jury's verdict. *Brooke Group v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). Second, the district court held that Seaman's analysis of the geographic market ignores the commercial realities of the Lafayette, Indiana area. Pet. App. at 30.

Seaman admitted that he did not do any investigation or analysis to determine the quality of the physicians, staff, equipment or facilities at the hospitals in the counties surrounding Lafayette. Resp. App. at 37-38. Seaman's own data shows that a significant number of patients living within Seaman's proposed eight county area travel to other hospitals outside the area as almost 24% of the persons living in Tippecanoe, Montgomery, and Clinton Counties already go to hospitals in Marion County for hospital services. Pet. App. at 30-31. In addition, the hospitals in Marion County are very competitive with GLHS. St. Vincent Hospital and Methodist Hospital in Indianapolis are larger than GLHS and have a well trained staff. These hospitals in Indianapolis compete with GLHS for the more complex procedures. Resp. App. at 49.

Thus, contrary to Kochert's protestations, the evidence in this case was simply insufficient to create any genuine issue of material fact on Kochert's antitrust claims, and the decisions of the lower courts were based upon sound considerations and without any weighing of the evidence. The Petition should therefore be denied.

CONCLUSION

An analysis of each of the issues decided by the district court and the Seventh Circuit shows that neither court weighed the opinions or testimony of Kochert's experts in

reaching their decisions that the Respondents were entitled to summary judgment. To the contrary, both courts determined that, notwithstanding the admissibility of this evidence, the testimony and opinions of Kochert's experts failed to create any genuine issue of material fact. The district court correctly recognized the distinction been the admissibility of the expert testimony and the evidentiary burdens of the parties in considering and granting summary judgment. Kochert confuses the standards by erroneously suggesting the mere admission of expert testimony should have equated to a finding of a genuine issue of material fact. Both courts carefully explained their reasons why the undisputed evidence demonstrated there were no genuine issues of material fact, and Kochert waived any claims to the contrary by failing to present them to the Seventh Circuit. Therefore, this case does not present any novel issue or analysis of Rule 56 of the Federal Rules of Civil Procedure or Rule 702 of the Federal Rules of Evidence. Accordingly, and for all of the reasons stated above, GLHS and Walling respectfully request that Kochert's Petition for Writ of Certiorari be denied.

Respectfully submitted,

LARRY R. FISHER
Counsel of Record
STUART & BRANIGIN LLP
300 Main Street, Suite 900
P.O. Box 1010
Lafayette, IN 47902-1010
Telephone: 765-423-1561
Facsimile: 765-742-8175

Counsel for the Respondents, Greater Lafayette Health Services, Inc. and John Walling

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

CAROLYN KOCHERT, M.D., Plaintiff, v. LAFAYETTE HOME HOSPITAL, INC., ANESTHESIOLOGY ASSOCIATES, P.C., and KENNETH J. BOCHENEK, M.D., Defendants.	)	CAUSE NO. 4:98 CV 0053 AS

DEPOSITION OF KENNETH J. BOCHENEK, M.D.

The deposition upon oral examination of KENNETH J. BOCHENEK, M.D., a witness sworn to before me, Vickie Switzer, a notary public in and for the State of Indiana, taken on behalf of the defendants, at the Law Offices of Stuart & Branigin, 300 Main Street, Suite 800, Lafayette, Tippecanoe County, Indiana, on the 8th day of April, 1999, pursuant to the Indiana Rules of Trial Procedure with written notice as to the time and place thereof.

* * *

[206] Q. What is the date of the meeting for which these minutes were created?

A. December 3, 1997, 6:00 p.m.

Q. Is this the meeting that you earlier referred to that's the one in which you discussed the possibility of not renewing the contract?

A. Yes, I believe it is.

Q. Was there discussion at this meeting about not renewing Dr. Kochert's contract?

* * *

[207] Q. Do you recall what anyone else said during this meeting?

A. A month and a half ago. It was the conclusion as is written in the minutes here that an extension would not be offered to Dr. Kochert. What each individual said at that meeting. I'm sorry I do not know.

* * *

[208] Q. Did you determine her work performance was sub-par?

WITNESS: Did I or did the corporation?

[209] MR. FOSTER: Either one. I'll take any answer at this point.

A. My personal feelings were that it was unacceptable.

Q. Could you tell me why?

A. Dr. Kochert is rude to patients. She's abrasive and abrupt with physicians. She is rude to hospital administration, and she is abrasive, condescending and rude to hospital staff members.

Q. Is that all the reasons in your mind?

A. In my mind that's enough.

* * *

[211] Q. No. Is there anything else sufficient or more than sufficient?

A. Yes. Her repeated attempts to undermine the success of the contract.

Q. Could you please be specific?

A. Be specific? Her repeated attempts at leaving an assigned area at Home Hospital to go to St. Elizabeth's Hospital to perform procedures. The documented attempt and performance of abandoning a call position at Home Hospital which is in direct conflict with her independent contractor's contract which forbid her doing so. Her actions intimidating patients to the point that they feared for their lives. That's a quote.

* * *

[212] Q. – So far you have talked about repeated attempts to undermine, repeated leaving of areas to go to St. Elizabeth's, abandoning an on call position.

A. Further undermining the morale of the corporate members and independent contractor members by substituting a false vacation book in the surgical staffing office of Home Hospital. And is there a reason that you are limiting it at the December date?

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT LAFAYETTE

CIVIL NO. 4:01CV27AS

CAROLYN G. KOCHERT, M.D.,

Plaintiff,

v.

GREATER LAFAYETTE HEALTH SERVICES, INC., d/b/a ST. ELIZABETH MEDICAL CENTER And d/b/a LAFAYETTE HOME HOSPITAL, ANESTHESIOLOGY ASSOCIATES, P.C., JOHN WALLING and KENNETH BOCHENEK, M.D.,

Defendants.

The continuing deposition upon oral examination of KENNETH BOCHENEK, M.D., a witness sworn to before me, Vickie Switzer, a notary public in and for the State of Indiana, taken on behalf of the plaintiff, at the law offices of Stuart and Branigin, 300 Main Street, Suite 900, Lafayette, Indiana, on the 4th day of November, 2003, pursuant to the Indiana Rules of Trial Procedure with notice as to the time and place thereof.

* * *

DEP. EXHIBIT 146

COMMERCIAL INSURANCE	
9/1/94 – 2/1/97	$41.00
21/1/97 – 1/22/99	$43.00
1/22/99 – 3/6/00	$48.00
3/6/00 –	$53.00

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT LAFAYETTE

CIVIL NO. 4:01CV27AS

CAROLYN G. KOCHERT, M.D.,

Plaintiff,

vs.

GREATER LAFAYETTE HEALTH SERVICES, INC., d/b/a ST. ELIZABETH MEDICAL CENTER And d/b/a LAFAYETTE HOME HOSPITAL, ANESTHESIOLOGY ASSOCIATES, P.C., JOHN WALLING and KENNETH BOCHENEK, M.D.,

Defendants.

DEPOSITION OF BARBARA CONARD, M. D.

The deposition upon oral examination of BARBARA CONARD, M. D., a witness sworn to before me, Maria S. Estes, a notary public in and for the State of Indiana, taken on behalf of the defendant, at the Law Offices of Stuart & Branigin, 300 Main Street, Lafayette, Indiana, on the 8th day of October, 2003, pursuant to the Indiana Rules of Trial Procedure with notice as to the time and place thereof.

* * *

[103] Q. Can you identify this document?

A. Okay, Articles of Organization of Lafayette
[104] **Anesthesiologists LLC.**

MR. ZAREMSKI: Is it 108? What was the one that were were just –

MS. WOODS: 108 –

MR. ZAREMSKI: – that we were just –

MS. WOODS: 107.

MR. ZAREMSKI: 107.

A. Deposition 108 – Articles of Organization of Lafayette Anesthesiologists LLC.

Q. Doctor, I'd like you to just look at the second page of this document. Do you recognize Dr. Farrell's signature on that?

A. Yeah.

Q. And this document indicates that the Articles of the Organization were executed on March 16, 1995, correct? On the second page, doctor –

A. Yes.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT LAFAYETTE

CASE NO. 4:01CV0027AS

CAROLYN G. KOCHERT, M.D.,

Plaintiff,

vs.

GREATER LAFAYETTE HEALTH SERVICES, INC., d/b/a ST. ELIZABETH MEDICAL CENTER And d/b/a LAFAYETTE HOME HOSPITAL, ANESTHESIOLOGY ASSOCIATES, P.C., JOHN WALLING and KENNETH BOCHENEK, M.D.,

Defendants.

DEPOSITION OF CAROLYN KOCHERT

The deposition upon oral examination of CAROLYN KOCHERT, a witness sworn to before me, Maria S. Estes, a notary public in and for the State of Indiana, taken on behalf of the defendant, at the Law Offices of Stuart & Branigin, 300 Main Street, Lafayette, Indiana, on the 4th day of September, 2002, pursuant to the Indiana Rules of Trial Procedure with notice as to the time and place thereof.

* * *

[15] Q. Okay. When was Advanced Pain Management formed?

A. Around August of '99, but we actually had a name before we actually did all the paperwork for it. So, I'm not sure exactly when we did all the paperwork –

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT LAFAYETTE

CIVIL NO. 4:01CV23AS

CAROLYN G. KOCHERT, M.D.,

Plaintiff,

v.

GREATER LAFAYETTE HEALTH SERVICES, INC., d/b/a ST. ELIZABETH MEDICAL CENTER And d/b/a LAFAYETTE HOME HOSPITAL, ANESTHESIOLOGY ASSOCIATES, P.C., JOHN WALLING and KENNETH BOCHENEK, M.D.,

Defendants.

The continuing deposition upon oral examination of JOSEPH FARRELL, M.D., a witness sworn to before me, Vickie Switzer, a notary public in and for the State of Indiana, taken on behalf of the plaintiff, at the Unity Medical Center, 1411 South Creasy Lane, Lafayette, Indiana, on the 20th day of October, 2003, pursuant to the Indiana Rules of Trial Procedure with notice as to the time and place thereof.

* * *

[40] Q. What was the rate that your group was charging before it raised to $55 per unit?

A. I believe it was $52 per unit.

Q. When did the rate of $52 per unit go into [41] effect?

A. 2001.

Q. Do you recall when in 2001 that rate went into effect?

A. I believe in the fall. I don't recall specifically.

* * *

[43] Q. Prior to increasing your group's rate to $52 per unit in the fall of 2001, what was your group's rate?

A. $48 per unit.

Q. Do you recall when your group raised its rates to $48 per unit?

A. Would have been just prior to June of '98. At [44] that time, I'm not even sure we raised it at that time. But that's what it was going into the contract with St. Elizabeth Hospital.

Q. I think your contract is one of the exhibits. Perhaps to refresh your recollection, I believe that when your group entered into the exclusive contract with St. Elizabeth, the contract provided that as of June 1, 1998 your group's per unit charge was $43; does that sound correct?

A. Okay, that could well be.

Q. And it was sometime after that that your group increased its rate to $48 per unit; do you recall that? While the contract was still in effect.

A. If it was $43 to start with, it seems that sometime during that period we did increase it to $48.

* * *

[47] Q. Now I understand that your group has a contract at this time with St. Clare Hospital; is that correct?

A. Yes.

Q. And essentially what are the services that you are expected and required to provide to St. Clare under your contract at St. Clare?

A. Coverage of the anesthesia needs of the hospital in the operating room and the obstetrical suite and elsewhere it's required.

Q. So this would be coverage of outpatient surgical anesthesia, inpatient surgical anesthesia, and OB anesthesia, correct?

A. Yes.

[48] Q. How many days a week is your group expected to provide that level of service?

A. Usually six out of seven.

* * *

[49] Q. Are you currently providing anesthesia services at St. Vincent Hospital in Frankfort?

A. Yes.

* * *

[50] Q. And the same doctor who provides surgery for outpatient anesthesia would also be qualified to provide services for inpatient or OB services at St. Vincent in Frankfort, correct?

A. Yes.

Q. Other than yourself, are there any other doctors from LA who are also providing anesthesia services at St. Vincent's in Frankfort?

A. Dr. Lempke and Dr. Gray.

* * *

[69] Q. When did you begin doing work at Logansport?

A. In I believe February of 2002, late February.

Q. Which of the doctors from LA worked at Logansport?

A. All of us.

Q. Did your group have a contract with Logansport?

A. Yes.

* * *

[89] Q. When Lafayette Anesthesiologists got the exclusive contract in June of 1998, I understand there were five anesthesiologists who were members of your group; is that correct?

A. Yes.

* * *

[117] Q. After Dr. Kochert went into pain management [118] on a full time basis did you regard Dr. Kochert as a competitor of LA?

MR. FOSTER: Object to the extent it asks the witness for a legal conclusion. Go ahead.

A. Probably not.

Q. And would that be because for all intents and purposes she was no longer in the business of providing anesthesia services for patients?

A. She was providing pain management services. It's a specialty area of anesthesia services and she was not providing OR services. So in that sense she wasn't a competitor.

* * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION OF LAFAYETTE

CAROLYN G. KOCHERT, M.D., Plaintiff, vs. GREATER LAFAYETTE HEALTH SERVICES, INC., d/b/a ST. ELIZABETH MEDICAL CENTER and d/b/a LAFAYETTE HOME HOSPITAL ANESTHESIOLGY ASSOCIATES, P.C., JOHN WALLING, and KENNETH BOCHENEK, M.D., Defendants.	)	No. 4:01CV0027AS

DEPOSITION OF PAUL J. GERTLER, PH.D.
Berkeley, California
Friday, February 6, 2004

Reported by:
JODI L. BOSETTI, RPR
CSR No. 11316
JOB No. 49390

* * *

[10] Q Okay. Well, what were you asked to do in this case, Doctor?

A I was asked to comment on my research.

Q Okay. And what research is that?

A It's the paper, "Strategic Integration of Hospitals and Physicians."

Q And were you asked only to comment on that paper or your research in general?

A Only on that paper.

Q Tell me how that paper came to be written?

* * *

[44] Q So am I correct, an individual practice association is some type of entity that is formed between physicians and hospitals in order to hold managed care contracts?

A Individual practice associations are a form of physician groups. And when they also include hospitals in them, their primary purpose is to deal with joint contracting with managed care organizations.

Q Do you know if there are any such groups at issue in this case?

A I do not know.

Q And so, of course, if there are not, anything that you say about these IPAs would not be relevant to this case, correct?

MR. ZAREMSKI: Objection. That's not what the doctor is saying, nor the fact about not seeing an exclusive contract. So please don't put words in the doctor's mouth.

Subject to that objection, you can answer if you can, Doctor.

THE WITNESS: Now, could you –

MS. WOODS: I'm going to move to strike the speaking objection, and if you do it again we'll call [45] the judge.

MR. ZAREMSKI: If you can appropriately ask questions and not put words in the witness's mouth then we will all be better off. So let's proceed.

BY MS. WOODS:

Q Answer the question, please, Doctor?

A Can you repeat it again, please.

Q She'll read it back.

(Record read.)

MR. ZAREMSKI: Continuing objection.

THE WITNESS: Well, I don't know anything about this case. I don't know the facts of the case.

* * *

[60] Q Do you have any –

A I should preempt, I've answered the question that I have no information about this case and none has been provided to me. So any questions you might ask about relating specifically to these contracts or this hospital I can't answer.

Q Okay.

A So that might save us some time. But if you want to ask it, then you can.

Q I want to make sure that we've made the record on this then. So you are basically saying that you've written

this paper, but you have no opinion as to how this paper relates to the particular facts of this case; is that correct?

MR. ZAREMSKI: Objection. That's not what he's testified to.

THE WITNESS: I said I don't know the facts of this case. I don't know the particular facts of the specific contract. What I can say is that unless it is a fully integrated organization type, which is such in my paper, it is not my belief that any relationship could lead to efficiency or quality improvements unless it is that contract.

* * *

[103] Q Okay. But in any particular instance – and if we can find ourselves for purposes of this litigation, since this is what this case is about, to the actual prices that are charged in Lafayette, Indiana by the two hospitals there – you're not able to tell us whether those prices are a result of the presence of any particular contracts those hospitals may have with physicians, correct?

MR. ZAREMSKI: Objection.

THE WITNESS: I don't know anything about the Lafayette market.

BY MS. WOODS:

Q Okay.

A I want to be more precise. I don't know the [104] facts of the case. I don't know even if there was a contract.

Q Or what kind of contract is was?

A Correct.

Q Or what happened to prices?

A Correct.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION OF LAFAYETTE

CIVIL NO. 4:01CV27AS

CAROLYN G. KOCHERT, M.D.,
Plaintiff,
v.
GREATER LAFAYETTE HEALTH SERVICES, INC., d/b/a ST. ELIZABETH MEDICAL CENTER And d/b/a LAFAYETTE HOME HOSPITAL ANESTHESIOLGY ASSOCIATES, P.C., JOHN WALLING, and KENNETH BOCHENEK, M.D.,
Defendants.

The deposition upon oral examination of CYNTHIA MEYER, a witness sworn to before me, Vickie Switzer, a notary public in and for the State of Indiana, taken on behalf of the defendants, at Unity Medical Center, Creasy Lane, Lafayette, Indiana, on the 21st day of October, 2003, pursuant to the Indiana Rules of Trial Procedure with notice as to the time and place thereof.

* * *

[43] Q When did LA go to the standard charge of $55.00 per unit?

A I believe it was March of 2003.

* * *

[52] Q When did you raise your rates to $52.00 per unit?

A That was September 1st of 2001.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT LAFAYETTE

CIVIL NO. 4:01CV27AS

CAROLYN G. KOCHERT, M. D.,
Plaintiff,
vs.
GREATER LAFAYETTE HEALTH SERVICES, INC., d/b/a ST. ELIZABETH MEDICAL CENTER And d/b/a LAFAYETTE HOME HOSPITAL ANESTHESIOLGY ASSOCIATES, P. C., JOHN WALLING, and KENNETH BOCHENEK, M. D.,
Defendants.

DEPOSITION OF CAROLYN KOCHERT

The deposition upon oral examination of CAROLYN KOCHERT, a witness sworn to before me, Maria S. Estes, a notary public in and for the State of Indiana, taken on behalf of the defendant, at the Unity Healthcare, 1345 Unity Place, Lafayette, Indiana, on the 19th day of November, 2003, pursuant to the Indiana Rules of Trial Procedure with notice as to the time and place thereof.

* * *

[46] Q Now, when you and Dr. Bigler were talking about opening your practice, and if I'm not mistaken, it was by August 1 that you had formed your practice and left Lafayette [47] Anesthesiologists, correct?

A No.

Q No? What's the date?

A We actually opened our office on August 23rd, '99.

Q Okay.

A And we did pain part-time and anesthesia part-time for at least a year and did not separate from LA until summer of 2000.

* * *

[250] Q Okay. Doctor, did there come a time when you were no longer on the schedule at St. [251] Elizabeth Hospital?

WITNESS: Schedule for elective cases?

MS. WOODS: For – yes, the surgery schedule for the anesthesia schedule?

A Yes.

Q And when was that?

A Probably starting September or August of 2000.

Q Okay. Did you have a discussion with Dr. Farrell, who was preparing the schedules at the time, as to whether you should appear on the August schedule in 2000?

A Actually, I think I was on the – I don't remember which schedule it was, but yes, there was a discussion with Dr. Farrell.

Q Okay. I'm going to show you what's been previously marked, and this exhibit is 136. And those are some schedules that Dr. Farrell produced during his deposition.

I'll direct your attention to the last page, which is the August 2001 schedule. I think you'll see that –

WITNESS: August 2000?

MS. WOODS: Yes.

Q – that your name does not appear on that [252] schedule.

A That's correct.

Q Okay, and Dr. Farrell testified that you were not on the August 2000 schedule or on the schedule on a regular basis after August of 2000.

MR. ZAREMSKI: I'm going to object insofar as Dr. Farrell's testimony speaks for itself.

MS. WOODS: Well, I'm sure it does but we're just trying to establish a context and move this along, Miles.

Q So did you have any reason to believe that you were on the schedule after August of 2000?

A No.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT LAFAYETTE

CIVIL NO. 4:01CV0027AS

CAROLYN G. KOCHERT,
Plaintiff,
v.
GREATER LAFAYETTE HEALTH SERVICES, INC., d/b/a ST. ELIZABETH MEDICAL CENTER and d/b/a LAFAYETTE HOME HOSPITAL ANESTHESIOLGY ASSOCIATES, P.C., JOHN WALLING, and KENNETH BOCHENEK, M.D.

The continuation of the deposition of CAROLYN G. KOCHERT, a witness sworn to before me, Vickie Switzer, a notary public in and for the State of Indiana, taken on behalf of the defendants, at the Unity Healthcare, 1345 Creasy Lane, Lafayette, Indiana, on the 1st day of December, 2003, pursuant to the Indiana Rules of Trial Procedure with notice as to the time and place thereof.

* * *

[121] Q Can you identify Exhibit 203, please?

A It's a letter from Women's Hospital in Indianapolis.

Q It's a three-page exhibit.

A Well the first part is a letter from Nan Todd to St. Elizabeth. The second one is application, consent and release, and the third one is clinical privileges for anesthesiology at Women's Hospital in Indianapolis.

Q Is that your signature on the application for privileges?

A Yes, it is.

Q What is the date of the application for privileges?

A 8/18/00.

Q Now does that help refresh your recollection that in fact you did seek privileges at one hospital in Marion County?

A I don't even remember doing this but obviously I did.

Q What was your reason for seeking privileges at Women's Hospital in Indianapolis?

A I don't even know. I don't remember – honest [122] to God, I don't remember this.

Q What privileges were you seeking?

A Anesthesia. That's what it says, anesthesia privileges. But "I do not intend to do surgical anesthesia." I think this must have been for pain management.

* * *

[139] Q So by August 1 of 2000 your pain management practice had advanced to the point where you elected

to open up a pain management practice apart from LA and do that as a full time basis, correct?

A Yes.

* * *

WOMEN'S HOSPITAL OF INDIANAPOLIS
CLINICAL PRIVILEGES
ANESTHESIOLOGY

"In emergency, any member of the Medical Staff to the degree permitted by license and regardless of service or staff status or lack thereof, shall be permitted and assisted to do everything possible to save the life of a patient, using every facility of the Hospital necessary, including calling for any consultation necessary or desirable." (Medical Staff Bylaws, Article VII, Section 3)

I do hereby request the following privileges indicated. I understand that in exercising any clinical privilege granted, I am constrained by relevant Hospital and Medical Staff Policies requiring consultations for difficult diagnoses, conditions of extreme severity, and procedures/conditions which are beyond my area of specialization and expertise, by Hospital policies concerning the types of patients for whom it does not have appropriate resources (facilities, equipment or personnel) to treat except on an emergency basis, and by such special policies as may from time to time be adopted.

____ Spinal anesthesia (Saddle Block) for vaginal delivery

__✓__ Intravenous regional anesthesia (Bier Block)

__✓__ Management of problems in pain relief by regional anesthetic

__✓__ The support of life functions under stress of anesthetic and surgical manipulations

__✓__ The clinical management of the patient unconscious secondary to anesthesia

__✓__ The application of specific methods of respiratory therapy

✓ Plexus anesthesia

✓ Management of problems in pain relief by regional anesthetic

✓ The management of procedures for rendering a patient insensible to pain and emotional stress during surgical, obstetrical and certain medical procedures

✓ The management of problems in pain relief

✓ The management of problems in cardiac and respiratory resuscitation

✓ The clinical management of various fluid, electrolytes and metabolic disturbances during surgery/recovery stage

ADDITIONAL PRIVILEGES.

_____ [I do not intend to do surgical anesthesia]

_____

_____

/s/ Carolyn G. Kochert 8/18/00

PHYSICIAN'S SIGNATURE DATE

APPROVAL:

_____ _____

MEDICAL DIRECTOR OF ANESTHESIA DATE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA HAMMOND DIVISION AT LAFAYETTE

CAROLYN G. KOCHERT, M.D.,	)	
Plaintiff,	)	
vs.	)	
GREATER LAFAYETTE HEALTH SERVICES, INC. d/b/a ST. ELIZABETH MEDICAL CENTER and d/b/a LAFAYETTE HOME HOSPITAL, INC., ANESTHESIOLOGY ASSOCIATES, P.C., JOHN and WALLING and KENNETH J. BOCHENEK, M.D.,	)	**Civil No. 4:01CV0027AS**
Defendants.	)	

PLAINTIFF'S ANSWERS TO INTERROGATORIES PROPOUNDED BY DEFENDANT, GREATER LAFAYETTE HEALTH SERVICES, INC., et al.

Plaintiff, Carolyn G. Kochert, M.D. ("Kochert"), by and through her attorneys, Miles J. Zaremski ("Zaremski"), Michael B. Brohman and Ron S. Brand of Kamensky & Rubinstein and Randall L. Vonderheide of Vonderheide and Knecht, P.C., and pursuant to the June 4, 2003 order of this Court, hereby responds to Interrogatories propounded by defendant, Greater Lafayette Health Services, Inc. ("GLHS"), as follows.

INTERROGATORIES
PROPOUNDED TO THE PLAINTIFF

* * *

15. Regarding Advance Pain Management (APM), please state:

15g. The date that you devoted your full-time effort to your pain management practice;

ANSWER

15g. August 1, 2000.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT LAFAYETTE

CAROLYN KOCHERT, M.D., Plaintiff, vs. GREATER LAFAYETTE HEALTH SERVICES, INC. d/b/a ST. ELIZABETH MEDICAL CENTER, and d/b/a LAFAYETTE HOME HOSPITAL, ANESTHESIOLOGY ASSOCIATES, P.C., JOHN WALLING and KENNETH BOCHENEK, M.D., Defendants.	CIVIL NO. 4:01CV27AS DEPOSITION OF DR. WILLIAM STEPEHN MINORE 12-19-03

Deposition of DR. WILLIAM STEPHEN MINORE, a witness of lawful age, taken on behalf of the defendants, Anesthesiology Associates, P.C., John Walling and Kenneth Bochenek, M.D., in the above-entitled cause, wherein Carolyn Kochert is the plaintiff and Greater Lafayette Health Services, Inc., et al. are the defendants, pending in the District Court of the United States for the Northern District of Indiana, Northern Division, Hammond Division at Lafayette, before Deb Fisher, notary Public in and for Winnebago County, Illinois, in the offices of Rockford Anesthesiologists Associated, 2202 Harlem Road in the City of Loves Park, State of Illinois, on the 19th day of December, 2003, commencing at 4:30 p.m., as reported and transcribed by Deb Fisher, Certified Shorthand Reporter in and for the State of Illinois.

* * *

[173] Q. Do you have any opinion whether Dr. Bochenek or any member of his group has deviated from the standard of care regarding any care or treatment of patients at St. Elizabeth?

A. I don't believe I've ever made a comment about St. Elizabeth Hospital, nor in my affidavits do I reference St. Elizabeth Hospital, so I guess I'm a little confused. But I'll stipulate I don't know what goes on at St. Elizabeth Hospital unless someone provides me some information to review.

Q. Well, that's just why I want to make sure that we're clear on the record you're not expressing any opinions about whether there had been any deviation from the standard of care regarding [174] any care and treatment of any patients at St. Elizabeth.

MR. ZAREMSKI: I'm going to object insofar as as long as there's no inconsistency with paragraph 8 of the doctor's affidavit.

MR. PENNELL: You may answer.

A. Like I said, I don't think I commented on anything with respect to St. Elizabeth.

* * *

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT LAFAYETTE

CAUSE NO. 4:01CV0027AS

CAROLYN G. KOCHERT, M.D.,
Plaintiff,

-vs-

GREATER LaFAYETTE HEALTH SERVICES, INC., d/b/a ST. ELIZABETH MEDICAL CENTER and d/b/a LaFAYETTE HOME HOSPITAL, ANESTHESIOLOGY ASSOCIATES, P.C., JOHN WALLING, and KENNETH BOCHENEK, M.D.,
Defendants.
_____/

DEPOSITION OF BRUCE A. SEAMAN, Ph.D.
Tuesday, January 28, 2004
9:03 a.m. – 5:40 p.m.

1325 Virginia Avenue
Atlanta, Georgia

REPORTED BY:
Sharon A. Gabrielli, RPR, CCR
Esquire Deposition Services
Atlanta Office Job #412373
Phone – 404.872.7890

* * *

[19] Q. Do you have any opinion in this case whether the closure of the OB unit at St. E and consolidating that with the OB unit at Home Hospital was an antitrust violation?

A. I would say that the mere closing of the OB unit in and of itself as opposed to issues that are raised more broadly by a series of events, just isolating the OB unit closing in and of itself, that would not typically be an antitrust violation.

* * *

[25] Q. Dr. Seaman, in Dr. Kochert's Memorandum in Opposition for Defendant's Rule 12 Motion to Dismiss, which was filed in this case on December 4, 2001, Dr. Kochert makes the following statement on page 38 of her brief: "Because two separate hospitals had anesthesiology services, there was not an anticompetitive effect to the market as a result of Dr. Kochert alone being barred from practicing only at [26] Lafayette Home Hospital. Had she brought an antitrust suit at that time, she would have legitimately faced a challenge for not alleging an antitrust injury for same purposes. Her injury would have been limited only to her. As in many of the cases cited by the defendants, even after Lafayette Home Hospital and St. Elizabeth's merged, Dr. Kochert was not precluded from half of the market. She and other members of LA could still practice at St. Elizabeth's."

Do you agree with that statement?

MR. ZAREMSKI: I'm going to object. That statement comes out of a pleading in response to a Rule 12(b)(6) proceeding. And it is done for advocacy purposes and in a different context.

THE WITNESS: I have one quick clarifying question, then I'll of course answer it. What was the exact source of that statement again; that was the pleading by Dr. Kochert?

Q. (By Mr. Pennell) It was her Memorandum in Opposition to a Defendant's Motion to Dismiss.

A. Right. I think the substance of that statement is broadly consistent with the answer that I gave a moment ago.

* * *

[81] Q. Are you aware of any testimony or evidence of whether the frequency of Dr. Bochenek's leaving the operating room is more or less after June 1, 2001 than it was before June 1, 2001?

A. I'm not aware of any testimony that specifically addressed that issue of frequency prior to 2001 versus after 2001.

Q. Are you aware of any testimony or evidence [82] as to whether his alleged conduct of frequently or regularly listening to the radio has happened any more or less frequently after June 1, 2001?

Mr. Zaremski: It has been asked and answered.

You can answer.

THE WITNESS: I think it is the same answer. I'm not aware that anyone had even been specifically asked that question.

Q. (By Mr. Pennell) Are you aware of any evidence or testimony as to whether the quality of care provided by Dr. Bochenek is better or worse after June 1, 2001 than it was before that date?

A. I think it would have to be the same answer. I'm not aware of a – I'm not aware of an answer to any deposition question or any affidavit that specifically attempted to

quantify the severity pre-2001 or June 2001 versus post-2001.

Q. Okay. Are you aware of any testimony or evidence that the quality of care provided by AA as a group is better or worse after June 1, 2001 than it was before June 1, 2001?

MR. ZAREMSKI: Asked and answered – I'll withdraw it.

You can answer.

[83] THE WITNESS: I think it's the same answer.

* * *

[276] Q. You've not done any study or factual analysis of the quality of the staff or facilities at these other hospitals, correct?

A. I think quality of staff, generally defined, would be difficult to get data on, absent subpoenas or something of internal records of complaints.

Certainly descriptively, we know how many beds they are. We know, for example – I can tell you this: In Tippecanoe County, using GLHS facilities and 740 beds, there are – there is a bed for every 210 people in Tippecanoe County.

In the surrounding counties, given the size of those facilities, which is some reflection of their adequacy, the number of people per bed or the – there is a bed for every 999 people, I believe, in White County; there is a bed for every 560-odd people, I believe, in Clinton County; and I

believe that figure is about a bed for every 380 or so people in Montgomery County.

Is that an adequate study? No. Does it reflect something about the adequacy of the facilities? Modestly. It deals with number of beds.

Q. All right. Other than the number of beds, [277] you have no facts or information about the quality of facilities at any of these hospitals correct?

A. I would love, dearly love to see such a study done by anyone else in this case and let me look at the data, because I think it's of some use. But I think it has been very difficult to generate such a study.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT LAFAYETTE

CAROLYN G. KOCHERT, M.D., Plaintiff v. GREATER LAFAYETTE HEALTH SERVICES, INC., d/b/a ST. ELIZABETH MEDICAL CENTER and d/b/a LAFAYETTE HOME HOSPITAL, ANESTHESIOLOGY ASSOCIATES, P.C., JOHN WALLING, and KENNETH BOCHENEK, M.D., Defendants.	)	4:01CV0027AS

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' RULE 12 MOTIONS TO DISMISS

(Filed Dec. 4, 2001)

Plaintiff, Carolyn G. Kochert, M.D., by her attorneys, Randall L. Vonderheide of Vonderheide & Knecht, P.C., and Miles J. Zaremski of Kamensky & Rubinstein, submit this Memorandum in Opposition To Defendants' Rule 12 Motions to Dismiss.

[38] Because two separate hospitals had anesthesiology practices, there was not an anticompetitive effect to the market as a result of Dr. Kochert alone being barred from practicing only at Lafayette Home Hospital. Had she brought an antitrust suit at that time, she would have legitimately faced a challenge for not alleging an "antitrust injury" for standing purposes; her injury would have been limited to only her, as in many of the cases cited by

Defendants. Even after Lafayette Home Hospital and St. Elizabeth's merged, Dr. Kochert was not precluded from half of the market – she and the other members of LA could still practice at St. Elizabeth's.

* * *

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 05-1196

Carolyn G. Kochert, M.D.

Plaintiff-Appellant,

v.

Greater Lafayette Health Services, Inc.,
d/b/a Lafayette Home Hospital,
d/b/a St. Elizabeth Medical Center,
John Walling and Anesthesiology Associates, PC

Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Indiana, Hammond Division
The Honorable Allen Sharp

No. 4:01cv0027

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT CAROLYN G. KOCHERT, M.D.

Miles J. Zaremski
Alon Stein
Kamensky Rubinstein
Hochman & Delott, LLP
7250 N. Cicero Avenue
Suite 200
Lincolnwood, IL 60712
(847) 982-1776

Attorneys for Plaintiff-Appellant

ORAL ARGUMENT REQUESTED

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ISSUES PRESENTED FOR REVIEW

I. Whether summary judgment is appropriate when:

A. The trial court has upheld under *Daubert* the relevance and validity of expert opinions validating all of plaintiff's material factual contentions.

B. Kochert has produced substantial material evidence that:

1. She has standing and has suffered antitrust injury as a direct consequence of defendants' actions excluding competition, including her competition, from the relevant market.

2. Defendants have market power or monopoly power in the relevant markets for hospital services and anesthesiology service,

3. Defendants used their power in the relevant market to exclude competition in the market for anesthesiology services.

4. Defendants have caused demonstrable harm to consumers of anesthesiology in the relevant market by reducing the quality of services, increasing their price, and decreasing the quantity or availability of these services

5. Defendants failed to produce any irrefutable evidence that the exclusion of competition produced legitimate, pro-competitive effects that unambiguously outweighed the consumer harm arising from Defendants' conduct.

II. Whether summary judgment is appropriate when the plaintiff has produced material evidence in support of plaintiff's alternative theories of antitrust liability that:

A. Defendants engaged in:

1. Unlaw[illegible]ying of access to hospital surgical and obstetric care in the relevant market to the purchase of anesthesiological services.

2. Unlawfully monopolizing the provision of anesthesiological services in the relevant market.

3. Unlawfully conspiring to restrain trade and engage in a boycott of competing suppliers of anesthesiology, including Kochert, in the relevant market.

4. Denying competitive anesthesiology providers access to their monopoly hospital facilities to the detriment of consumers.

III. Whether summary judgment is appropriate when Kochert produced material evidence that her damages were a direct consequence of her exclusion from providing anesthesiology services to consumers desiring those services in the relevant market.

* * *

[29] Although it is difficult to prove a negative, a thorough review of the case law has failed to uncover any cases in which a court found that expert testimony was both [30] relevant and reliable regarding material facts, but that summary judgment was then appropriate.

* * *

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 05-1196

Carolyn G. Kochert, M.D.

Plaintiff-Appellant,

v.

Greater Lafayette Health Services, Inc.,
d/b/a Lafayette Home Hospital,
d/b/a St. Elizabeth Medical Center,
John Walling and Anesthesiology Associates, PC

Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Indiana, Hammond Division
The Honorable Allen Sharp

No. 4:01cv0027

REPLY BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT CAROLYN G. KOCHERT, M.D.

Miles J. Zaremski
Alon Stein
Kamensky Rubinstein
Hochman & Delott, LLP
7250 N. Cicero Avenue
Suite 200
Lincolnwood, IL 60712
(847) 982-1776

Attorneys for Plaintiff-Appellant

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT LAFAYETTE

CAROLYN KOCHERT, M.D. Plaintiff, v. GREATER LAFAYETTE HEALTH SERVICES, INC., d/b/a ST. ELIZABETH MEDICAL CENTER, and d/b/a LAFAYETTE HOME HOSPITAL, ANESTHESIOLOGY ASSOCIATES, P.C., JOHN WALLING and KENNETH BOCHENEK, M.D., Defendants.	Civil No. 4:01CV27AS

AFFIDAVIT

Comes now Jeffrey R. Nagy, who being duly sworn upon his oath, deposes and says:

1. I am presently employed by Greater Lafayette Health Services, Inc. (GLHS) as the Executive Vice President and Chief Operating Officer responsible for the operation of St. Elizabeth Medical Center (St. E) and Home Hospital (HH) in Lafayette, Indiana. GLHS is a not-for-profit corporation which was established in 1998 as the owner and operator of St. E and HH as a result of the consolidation of the two hospitals. Prior to the formation of GLHS, St. E and HH were independently owned and operated. Prior to the formation of GLHS, I was the Chief Financial Officer for HH.

* * *

14. There are several hospitals in nearby counties including White, Montgomery, Cass, Clinton, Boone, Jasper and Warren counties which are within an hour drive from Lafayette. These and other hospitals compete for patients who require hospital services. These hospitals compete with GLHS for patients who require outpatient and most of the same inpatient services provided by GLHS. There are a few high risk, more complicated inpatient procedures, such as open heart surgery, which are not performed in these hospitals. In these cases, GLHS must compete with the hospitals in Indianapolis for patients needing these services. St. Vincent's hospitals in Frankfort and Williamsport are affiliated with the St. Vincent's Hospital in Indianapolis. Given this affiliation, referrals of patients to St. Vincent Hospital in Indianapolis would be a common occurrence. St. Vincent's Hospital and Methodist Hospital in Indianapolis are easily accessible to patients living in the Lafayette area. The travel time on I-65 between Lafayette and these Indianapolis hospitals is just about one hour. St. Vincent's Hospital and Methodist Hospital in Indianapolis are each larger than GLHS. They are excellent medical facilities and have highly trained and skilled staffs and physicians.

15. The competition from these and other hospitals act as constraint on any ability of GLHS to engage in any anti-competitive behavior such as raising prices to uncompetitive levels or reducing quality. Almost 50% of GLHS' patients reside outside of Tippecanoe County. GLHS would risk the loss of a significant number of these patients as well as patients living in Tippecanoe County if GLHS were to attempt to engage in such uncompetitive behavior.

* * *

Further affiant saith not.

/s/ Jeffrey R. Nagy
Jeffrey R. Nagy